Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 86-137

In the Supreme Court of the United States

OCTOBER TERM, 1986

CAROL AMEND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certain jury instructions and comments by the district court unfairly prejudiced petitioner.

2. Whether the district court improperly admitted evidence of petitioner's previous federal drug convictions and her failure to file income tax returns.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 791 F.2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1986 (Pet. App. 1). A petition for rehearing was denied on May 30, 1986 (Pet. App. 19-20). The petition for a writ of certiorari was filed on July 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848; one count of conspiring to import marijuana, in violation of 21 U.S.C.

846; and six substantive importation and distribution counts, in violation of 21 U.S.C. 960(a)(1) and 841(a)(1). She was sentenced only on the CCE count; on that count she was given 30 years' imprisonment without possibility of parole and fined $100,000. The court also ordered her to forfeit certain assets and profits gained through her illicit enterprise. Pet. App. 1-2.

The court of appeals affirmed the convictions (Pet. App. 1-18), but reversed that part of the forfeiture order forfeiting a bank account in the Bahamas and a purebred Arabian horse, on the ground that the special verdict was not specific enough to support the forfeiture of those items (*id.* at 17-18). Petitioner adopted a " 'shotgun' approach on appeal" (*id.* at 7), raising a great number of issues; those raised in the current petition were rejected summarily in a footnote in the appellate court's opinion (see *id.* at 13 n.5).

2. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2-6). It established petitioner's involvement in at least five marijuana smuggling offenses between 1975 and 1980.

In 1975, petitioner engaged in a scheme to import 40,000 pounds of marijuana into the United States; as a result of that scheme, she was convicted in the Southern District of Mississippi of conspiring to import marijuana and to possess it (Pet. App. 3). In 1978, petitioner contracted to have 7,500 pounds of marijuana smuggled into the country on a vessel she owned; the marijuana eventually ended up in a house co-leased by petitioner (*id.* at 3-4). In 1979, petitioner paid $140,000 to have a 25,000 pound shipment of marijuana picked up in Colombia and taken to Dominica, where she was waiting. There the marijuana was distributed among four sailboats, two of which petitioner co-owned. Petitioner agreed to pay another smuggler $1 million to offload part of the shipment in South Carolina. *Id.* at 4-5.

Petitioner also hired an offloader in 1980, this time for a shipment of 20,000 to 22,000 pounds of marijuana to South Carolina. At one point during this scheme, when a Coast Guard vessel almost discovered the boat carrying the shipment, petitioner exclaimed to the offloader, "You got to do something, that's my boat and my load, what are you going to do?" Another participant also testified that petitioner owned the marijuana and directed the activities. *Id.* at 6.

ARGUMENT

Petitioner contends that she was unfairly prejudiced (1) by certain jury instructions and comments by the trial judge, and (2) by the admission of evidence of prior convictions and uncharged crimes. Petitioner does not point to a conflict with respect to either claim between the summary disposition of the court of appeals and a decision of any other court of appeals. The affirmance was correct and further review is not warranted.

1. Petitioner contends (Pet. 5-11) that various instructions and comments by the trial judge unfairly prejudiced her. The court of appeals properly rejected these claims.

a. Relying on *Caldwell* v. *Mississippi*, No. 83-6607 (June 11, 1985), petitioner contends that the court's instructions twice improperly led the jury to "perceive[] its role as *preliminary* rather than final" (Pet. 7 (emphasis in original; footnote omitted)). First, just prior to jury selection, the trial judge stated to the prospective jurors (Pet. App. 21-22; 10 Tr. 31-33[1]):

> Now, ladies and gentlemen, for your own information and to put you in a better position to answer the questions which I will ask you, I would like to tell you a little bit about what this trial is all about and also identify for you the attorneys for the prosecution and

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[1]We will number the transcript volumes as petitioner did in her brief in the court of appeals (at viii) and in her petition.

> the attorneys for the defendant, as well as identifying the defendant for you, because you will be asked questions about your acquaintanceship or your contact or your knowledge with the attorneys, or whether you have any relationship by blood or marriage with any of them or with the defendant.
>
> Now this is a criminal case, and this Court is a trial court. We try the cases at this level. This is known as the United States District Court. Immediately above this Court, sitting in Richmond, Virginia, is what we call the intermediate appellate court, which is the 4th Circuit Court of Appeals.
>
> [Interruption by arrival of tardy juror.]
>
> As I was saying, this is a trial court. We have an intermediate appellate court known as the 4th Circuit Court of Appeals that sits in Richmond, Virginia, that looks over the shoulder of this Court, and it is the Court to which a first appeal from a conviction or a trial in this Court would go.
>
> And then beyond that, we have the United States Supreme Court, which is the highest Court in the appellate system, and the highest Court in the United States.

Second, in his final charge to the jury, the judge stated (Pet. App. 22; 16 Tr. 3-4):

> Of course, the court reporter takes down every word that I say, and if I should give you a wrong or an erroneous princip[le] of law, there's a very fine appellate court that sits above me in Richmond that would correct my mistakes in this case, as it has corrected my mistakes in the past. So, do not be concerned about any principle that I give you as to whether or not it states a correct principle of law.

The court's statements were not remotely prejudicial. In *Caldwell*, a death penalty case, the prosecutor argued to the

jury that it was not finally determining whether the defendant would die, because a death sentence would be reviewed for correctness by an appellate court. Emphasizing the qualitative difference between the death penalty and other punishments, this Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" (slip op. 7). Here, by contrast, nothing in the court's statements suggested that anyone but the jury had the responsibility to determine petitioner's guilt. The court's first statement was intended merely to inform the jury about the court system and did not convey any information that a reasonably well-informed citizen would not already know. This statement and the information given immediately before it and after it simply explained in a general way how the judicial system works. The second statement cited by petitioner obviously was designed to impress on the jury its obligation to follow the court's instructions even if it disagreed with them; it suggested only that the court's charge—not the jury's verdict—was reviewable. Indeed, just before this charge the judge had said, "Now, you have been told, and I reiterate it now, that you are the sole judges of the facts" (16 Tr. 3).[2]

b. Next, petitioner asserts that "the District Court vouched for the credibility of co-conspirators who had become Government witnesses, by stating to the jury that it had approved the plea bargains entered into by these witnesses" (Pet. 8). In the incident petitioner cites as illustrating this error, a government witness testified on direct examination that he had pleaded guilty to charges in this

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[2] *Caldwell* is, of course, also distinguishable because it involved only capital sentencing, where the range of discretion afforded the jury and the nature of the sentence call for greater judicial scrutiny than when the jury is performing its more traditional role of finding facts and determining guilt or innocence. See slip op. 7; *Lockhart* v. *McCree*, No. 84-1865 (May 5, 1986), slip op. 18-20.

case pursuant to a plea agreement; on cross-examination, petitioner inquired about the negotiations between the witness and the government. When the government objected to this inquiry, the court sought to explain plea bargaining to the jury. In the course of doing so, the court stated that "I was the judge and I approved the plea bargaining" (Pet. App. 22-23; 11 Tr. 98).

Thus, petitioner again makes what is, at the very best, a gross overstatement. The court merely sought to explain how plea bargaining works; it did not remotely suggest that its approval of the plea bargain reflected the witness's credibility. Petitioner did not object, and the court allowed her to continue the inquiry into "how often [the witness] bargained and what he had to do" (Pet. App. 23; 11 Tr. 98). And, in its final instructions, the court told the jury that nothing it had said during the trial was intended to express an opinion on the evidence or the credibility of any witness (16 Tr. 72). Petitioner agreed he was satisfied with this instruction (*id.* at 73).[3] The challenged comment was not prejudicial.

c. Petitioner argues (Pet. 8) that the district court improperly commented that the evidence against her was "overwhelming" (Pet. App. 23-25; 10 Tr. 157-158). Petitioner neglects to mention, however, that the comment was made outside the hearing of the jury (see 10 Tr. 150, 162). Accordingly, there was no prejudice.[4]

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[3]The judge also said in the instructions that "the fact that an accomplice has entered a plea of guilty to an offen[s]e with which he's charged is not evidence in and of itself of the guilt of * * * defendant" (16 Tr. 10).

[4]Petitioner was more forthcoming in her appellate brief (at 35), where she acknowledged that the jury was not present during this comment. There, she cited the comment as evidence more generally of the court's bias. The court's comment that there was strong evidence of guilt was, however, in the context of whether the admission of certain evidence would be unduly prejudicial. It did not demonstrate bias, let alone such egregious bias as to deny a fair trial.

d. The petition (at 8-9) claims that the "probably most blatant violation of Petitioner's Fift.. and Sixth Amendment rights" occurred during the trial when the district court excused a juror and replaced her with an alternate "without Petitioner's counsel being afforded an opportunity to sufficiently object." This claim is wholly without substance.

The record shows that during trial a juror presented a doctor's note to the court stating that she would not be able to perform her jury duties. The judge read the note into the record and then asked the juror if she felt that she could not continue to serve. The juror responded, "No, sir. Would you like for me to explain it to you?" At that point, petitioner's counsel interjected that he could not hear the proceedings, and the court replied, "Well, I don't know that it's necessary for you to hear this," apparently because the court did not "want to embarrass [the juror] in any way." Nonetheless, the juror was then required at counsel's request to state in greater detail her reasons for wishing to be excused, and petitioner's counsel was allowed to hear the reasons and to ask her any questions himself. The judge then concluded, over counsel's objection, that in light of the juror's statement that she was unable to keep her mind on the proceedings, she should be excused. The decision to excuse the juror was clearly reasonable and, with three alternates available, clearly nonprejudicial. The insubstantiality of counsel's objections is underscored by the fact that he initially indicated in this colloquy that he had never wanted the juror on the panel, but later objected to her being excused. In sum, neither the substance of what the court did nor the procedure that the court followed was even remotely improper or prejudicial to petitioner. Pet. App. 25-33; 13 Tr. 2-8.

e. Petitioner also argues (Pet. 9-10) that the trial court improperly instructed the jury when it said (Pet. App. 34; 16 Tr. 10-11):

> The weight of the evidence is not necessarily determined by counting the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which witnesses are worthy of credence and belief. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

Petitioner objects to this instruction because she did not testify or call any witnesses. But in the first place, as the petition concedes (at 9 n.4), the instruction was given only because petitioner had requested it. Moreover, the district court also instructed the jury that a defendant is not required to testify or produce any evidence (16 Tr. 7-11). Indeed, immediately after the quoted paragraph the judge continued, "You are not required to accept testimony, even though the testimony is uncontradicted and the witness is not impeached" (*id.* at 11). While petitioner's counsel did object to the "weight" instruction (*id.* at 67-68), he did not press the issue after the judge pointed out that he had requested the instruction and counsel subsequently agreed that he was "satisfied" with the instructions (*id.* at 73). In any event, the instruction was a correct statement of the law designed to convey to the jury the point that guilt or innocence is not to be determined solely by counting the number of witnesses on each side. In view of petitioner's failure to call any witnesses, that principle could only have helped her.

f. Finally, petitioner takes issue (Pet. 10) with the court's statement to the jury (Pet. App. 35; 15 Tr. 181-182) that

> these attorneys are advocates, they're partisans, they're trying to convince you that their side of the case should prevail. But under your oath and under my oath, we're not permitted to be partisan in any manner.

> We spent a great deal of time selecting you as a disinterested, fair-minded, unbiased, unprejudiced jury, and I'm as confident as I've ever been of anything that this jury will arrive at a fair and just verdict, a verdict that does justice to the parties here.

This was a balanced instruction that conveyed to the jury that, unlike the attorneys in the case, it had an obligation to be impartial. The instruction did not single out defense counsel as a "partisan"; the characterization was directed to "these attorneys," which of course included the prosecution.[5]

2. Petitioner contends that the district court improperly admitted evidence of her previous federal drug convictions in Mississippi and her failure to file income tax returns (Pet. 12-16). These claims were also properly rejected by the court of appeals.

a. Petitioner contends (Pet. 12-14) that the government could establish her commission of a "continuing series of violations" under the CCE statute, 21 U.S.C. 848(b)(2), only by evidence of the facts underlying her convictions, and that the convictions themselves were inadmissible for that purpose as unduly prejudicial "character" evidence. The prior conviction evidence, however, was certainly probative of one of the elements of a CCE charge—that the defendant has engaged in a continuing series of violations—and it was not substantially more prejudicial than other evidence of the violations. Petitioner's proposal—that the government instead be required to enter anew all testimony and physical evidence it offered at the earlier trial—is impractical, wasteful, and serves no purpose except to make

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[5]That both sides were being referred to in the instruction above is confirmed by the judge's admonition to do "justice to the *parties* here" (emphasis added); petitioner was the only defendant at trial.

a CCE trial longer and give a defendant the opportunity to rehash defenses that were rejected in the prior proceedings. The court in *United States* v. *Lurz*, 666 F.2d 69, 77 (4th Cir. 1981), certs. denied, 455 U.S. 1005, 457 U.S. 1136, and 459 U.S. 843 (1982), correctly noted that the CCE statute "is a variant of recidivist statutes"; in light of that essential nature of the statute, there is no reason why previous judgments of conviction should not be admissible and even sufficient[6] to establish the requisite series of violations.[7]

Finally, any danger that the evidence of the previous convictions would prejudice the jury against petitioner was removed by the district court's explicit instruction—given immediately after the introduction of that evidence—that the evidence could not be considered as evidence of petitioner's character (10 Tr. 167-168).

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[6]The government did not rely entirely on the convictions; it introduced other proof of the 1975 predicate offense as well (17 Tr. 28-31). Logically, a defendant could be collaterally estopped from challenging the existence of prior violations when she has been convicted of them, just as the government may be collaterally estopped from asserting the existence of prior violations when a defendant has been acquitted of them. See *Garrett* v. *United States*, No. 83-1842 (June 3, 1985), slip op. 4-5 (O'Connor, J., concurring) (citing *Ashe* v. *Swenson*, 397 U.S. 436 (1970)). Here, petitioner was not so estopped, and the court of appeals—as the petition (at 14) points out—found the series element of the CCE to be met even without the evidence of the Mississippi violations for which she was convicted (Pet. App. 10-11).

[7]Of course, a CCE violation is a separate offense, not simply a statutory penalty for recidivists. See *Garrett* v. *United States*, slip op. 4-12. Thus, even if the judgments of conviction are introduced, additional proof—including additional proof relating to the predicate offenses—would be necessary to meet the further requirements of a CCE offense: that the defendant committed a principal violation which is part of a "continuing series of violations," and that in those predicate violations he acted in concert with five or more people, was an organizer or supervisor, and derived substantial income or resources from the enterprise (21 U.S.C. 848(b)).

b. Nor is there any merit to petitioner's claim (Pet. 14-16) that the district court improperly admitted evidence of her failure to file federal tax returns. "In a narcotics prosecution, it is well established that the government may introduce evidence of cash purchases coupled with tax evidence tending to show that a defendant had no legitimate source of cash. The tax evidence may include the failure to file tax returns." *United States* v. *Saint Prix*, 672 F.2d 1077, 1084 (2d Cir.), cert. denied, 456 U.S. 992 (1982) (citations omitted). See also *United States* v. *Mitchell*, 733 F.2d 327, 331 (4th Cir.), cert. denied, 469 U.S. 1039 (1984) (following *Saint Prix*). The tax evidence here was admissible under that rule, particularly in light of other evidence establishing that petitioner had access to large amounts of cash (see, *e.g.*, 18 Tr. 8-11).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1986

DOJ-1986-10